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No. 71-314

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIAM F. ADCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Southern District of New York, petitioner, an attorney, was convicted on three counts of a five-count indictment charging him with causing false statements to be made to the Immigration and Naturalization Service, and with personally making such false statements, in violation of 18 U.S.C. 2 and 1001, respectively. He was sentenced to concurrent prison terms of one year on each count. The court of appeals affirmed the conviction on the first count *per curiam*,[1] but reversed the convictions on the other two counts (Pet. App.).

[1] Count I charged petitioner with making a false statement in his own notice of appearance on behalf of an applicant before the Immigration and Naturalization Service.

Petitioner contends here, as he did below, that his conviction should be overturned because the trial judge gave the supplemental "*Allen*" charge (*Allen* v. *United States*, 164 U.S. 492). We do not agree.

After the jury had deliberated for four and one-half hours, over the course of two days, it sent a note to the court asking: "Must we have a unanimous decision on each count? Can we return a unanimous verdict on some counts and not others? If the decision is not unanimous on any count, is the defendant considered not guilty on this count?" (Tr. 549).[2] The court informed counsel of its intention to "give them [the jury] the equivalent of the *Allen* charge"; the trial judge then so charged the jury, reading from a portion of the *Allen* case, and giving some additional explanatory remarks of his own (Tr. 549, 553–560).

1. It is petitioner's principal contention that use of the supplemental charge is prejudicial *per se*, in that it exercises a "coercive influence on the jury, thereby denying Sixth Amendment rights to trial by an impartial jury * * *" (Pet. 15). No federal court that has considered the question, however, has yet found that the mere giving of the *Allen* charge is *per se* reversible error. See *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934;[3] *United*

[2] "Tr." references are to the transcript of proceedings in the trial court, which was filed by petitioner as an appendix in the court of appeals.

[3] Without specifically reconsidering or overruling *Fulwood*, the Court of Appeals for the District of Columbia, sitting *en banc* in *United States* v. *Thomas*, No. 22,768, decided September 14, 1971, in the exercise of its supervisory power, adopted prospectively the standard and instruction approved by the American Bar Association for future charges of the *Allen*-type.

States v. *Bowles*, 428 F. 2d 592 (C.A. 2), certiorari denied, 400 U.S. 928; *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2), certiorari denied, 396 U.S. 835; *Posey* v. *United States*, 416 F. 2d 545 (C.A. 5), certiorari denied, 397 U.S. 946. Although some federal courts have adopted prospective modifications of the standard *Allen* charge (see *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017;[4] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837), these modifications were ordered in the exercise of the appellate courts' supervisory powers and, as such, do not warrant further review by this Court. See *Fisher* v. *United States*, 328 U.S. 463, 476–477.

2. Petitioner also asserts that, even if the *Allen* charge is not *per se* coercive, the supplemental instruction in this case was improper. The argument finds little support in the record. After answering the jurors' inquiries, the trial judge attempted to establish guidelines to aid the jury in its deliberations, while also disavowing any attempt to coerce or influence the jury (Tr. 553–555). He stressed the importance of the case to the defendant, the government and the community; he then made the following comments which petitioner claims introduced improper considerations into the jury's deliberations (Tr. 556):

> * * * The trial has been expensive. If you should fail to agree on a verdict with regard to any

[4] In *Brown* petitioner's constitutional arguments were rejected by the court. See also *Hodges* v. *United States*, 408 F. 2d 543 (C.A. 8).

> count, that count is left open and undecided. Like all cases, it must be disposed of some time.
>
> There appears absolutely no reason to believe that another trial would not be equally expensive, nor does there appear any reason whatsoever to believe that the case can be tried again more expertly or more exhaustively than it has been on either side. Any future jury must be selected in the same manner and from the same source as you were chosen. There appears to this Judge no reason to believe that the case would ever be submitted to twelve jurors more intelligent, more impartial or more competent to decide it or that more or clearer evidence would be produced on behalf of either side.

These comments, when viewed in the context of the entire supplemental charge, did not have a coercive effect on the jury. The trial judge repeatedly instructed the jury that if, after deliberating among themselves, certain jurors could not, according to their conscience, reach agreement, it was their sworn duty to withhold consent to the verdict (Tr. 555, 557, 559). Moreover, any conceivable uncertainty that may have arisen from the above references to the cost, in terms of time and money, of a possible retrial, was eliminated by the judge's remarks just prior to the close of the supplemental charge (Tr. 559):

> You would be prostituting your oath if you were to say, "Well, it's going to cost money and all that, so, okay, I'll go along." What kind of an argument is that? Ministers of justice doing a thing like that? That is not fulfilling your obligation. These parties, the Government and the defendant, are entitled to your verdict. If your verdict means acquittal as to some or as to all or

guilt as to one or all or disagreement to one or all, after due deliberations, if that is what you come up with, then stand on your feet and say so. * * *

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

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